

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Companies Action No.HBE 69 of 2020

**IN THE MATTER** of a Statutory Demand dated 15 September 2020 taken out by **FIJI PUBLIC SERVICE ASSOCIATION** ("the Respondent") against **REDOX LIMITED** ("the Applicant") and served on the Applicant on 15 September 2020.

**AND**

**IN THE MATTER** of an application by the Applicant for an Order setting aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015

**BETWEEN:**           **FIJI PUBLIC SERVICE ASSOCIATION:** a duly registered Trade Union having its registered office at Level 298 Waimanu Road, Suva in the Republic of Fiji.

**PETITIONER**

**AND:**               **REDOX LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Level 8, BSP Life Centre, 3 Scott Street, Suva in the Republic of Fiji.

**RESPONDENT**

**Counsel**               : **Petitioner: Ms Nand. S**  
                              : **Respondent: Mr Fatiaki. S**  
**Date of Hearing**       : **21.04.2021**  
**Date of Judgment**   : **12.10.2021**

**JUDGMENT**

**INTRODUCTION**

1. Petitioner filed this action against Redox (the Company) on the basis that there was an unsettled debt over the threshold limit to seek winding up. Respondent did not

seek stay within stipulated time period. So an application was filed, seeking leave to oppose winding up. This was opposed and after hearing the application to file opposition was allowed on 30.3.2021. Considering the amount of debt and circumstances, parties were also given the opportunity to rely on the materials already submitted to court at the hearing of winding up. Respondent had filed affidavit in opposition to winding up and both parties relied on the material already submitted. Hearing concluded on 21.4.2021. Due to pandemic and issues relating to that, the time period for this action is extended till the date of judgment in terms of Section 528 of Companies Act 2015. Statutory Demand was for alleged arrears of rentals, for months of April and May, 2020. The details were given in the statutory demand. It was simply relating to Shop No 27 and 28 as per the invoices of the Petitioner, which were rentals in terms of tenancy agreement and it also had a deposit of \$2000. This made the alleged debt below threshold. Even if I am wrong on that, Petitioner knew before issuance of statutory demand, that they had granted waiver of rentals for months of April and May, and the Company had relied on that and had acted on that. This made winding up unsuitable as there was no debt due and payable, exceeding \$10,000. Application for winding up refused.

## **FACTS**

2. The Company was in operation of business for more than sixteen years and was the tenant of the Petitioner from 2004. Due to its development of business in the same premises.
3. There was no issue relating to rent between parties till break out of pandemic and also closure of business in 2020. The Company was reluctant to leave the premises where they were recognized, but left due to logistical reasons in amicable manner.
4. The relevant tenancy agreement was entered by the parties on or about 1.7.2009. This tenancy agreement was renewed on 25.9.2019 and there was no evidence of any default or any other issue till the Company issued letter to vacate both premises, on their own accord.
5. When tenancy agreement was entered a payment of **\$2,000.00** was made to the Petitioner, as a security deposit by the Company, and this remained with Petitioner and never paid to the Company and or deducted from invoices issued in relation to lease agreement.
6. Due to COVID -19 pandemic the Company requested the Petitioner for concession on or about 23.3.2020. In the absence of response from the Petitioner, the Company on 1.4.2020 issued a Notice of Vacation from both premises.
7. However, by email of 23.4.2020 the Petitioner, granted three months 'rent waiver from April, to June, 2020' to the Company.

8. There are email correspondence between parties in the months of May and June regarding some issues that had arisen between them, and finally the Company vacated the premises in June, 2021.
9. All the communications were relating to restructuring of the Company and its intention to occupy only one premises to be a viable business during downturn of business.
10. On or about 12.5.2020 the Petitioner emailed the Company and inquired, that they have received the First Notice to Vacate, and inquired, whether they intend to do so despite rent waiver offered on 23.4.2020.
11. In reply the Company informed that since they were offered rental waivers for three months, they would continue tenancy. In the same email indicated that their business was suffering hardships due to pandemic.
12. On 19.5.2020 the Petitioner, asked for the undertaking from the Company for it to continue its tenancy that would expire in 2022. They inquired whether Company would vacate once rent waiver ended, in June.
13. The Company informed their reluctance to leave both premises, as their location was one feature of identity of their business to existing and prospective customers. However, the Company informed that it needed to downsize its business. So informed their, desire to downsize amalgamated premises to one premises.
14. The Company on 1.6.2020 issued Second Notice to Vacate, but this was only confined to shop 26 and informed, that they would remain in occupation in shop 27.
15. The Petitioner informed that there was an error on shop numbers mentioned in the Company's Second Notice of Vacation and said that they were occupying shop 27 and 28, hence assumed that Second Notice of Vacation referred to Shop 27. Irrespective of error in number, the Company was asking to vacate half of the premises rented.
16. On 4.6.2020 the Respondent asked the Applicant Company to vacate the said one shop by 8.6.2020. According to the Company it had handed over the keys of the one shop to the Petitioner within time.
17. According to the Company, on same day upon inspecting the shop the Petitioner had asked the Company to vacate both shops due to issues regarding the sharing of exit door and washroom, and notified the Company to vacate both premises.

18. On 9.6.2020 Petitioner issued invoices for the month of June 2020 with the Statement for the months from April to June 2020, stating rent waiver for 3 months (Annexed "AH-13" to affidavit in support of 1.2.2021).
19. The Company vacated both shops and handed over another set of keys to the Petitioner on 12.6.2020.
20. After vacating the shops the Petitioner on 22.6.2020 issued a new invoice claiming rentals for three months and indicated that the Company has breached the tenancy agreement. The new invoices were not attached to the affidavit in support or reply. Subsequent email referred to said invoices and total value due on them was \$10,472.14(see Annexed AH 16 to affidavit in support of 1.2.2021).
21. Petitioner issued statutory demand for winding up for said debt of 10,472.14 and this consisted rental arrears of \$10,036.14 for months of April, and May 2020 and outgoings of \$436.
22. Petitioner had confirmed retention of rental deposit of \$2,000 in terms of rental agreement but wanted that to be set off against another transaction outside lease payments. (see email of 22.7.2020, Annexed AH 17 to Affidavit in support)
23. According to the Company after receiving the statutory demand of 15.9.2020 it had exchanged communications to solve the issue. (see paragraph 22 of the affidavit in support).
24. There was no evidence that prior to vacation of premises Petitioner had indicated to the Company that the rent waiver granted was withdrawn by them due to vacation of both premises occupied by them.

## ANALYSIS

25. A company can be wound up if it is insolvent in terms of Section 513(c) of Companies Act 2015.
26. The word 'insolvent' is defined in Section 514 of Companies Act 2015. A 'Company is Solvent if, and only if, it is able to pay all its debts, as and when they become due and payable'<sup>1</sup>. If it is unable to pay all its debts when they become due and payable, it is to be considered as insolvent.<sup>2</sup>
27. There is no need for a company to be financially liquid, so as it could pay all its

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<sup>1</sup> Section 514 (1) of Companies Act 2015

<sup>2</sup> Section 514(2) ibid

debts at any moment. This is very tall order for highly leveraged entities such as financial institutions. What is important to note is a company should be able to honour its debts, when they are due and payable, and failure to do so can be considered as insolvent in terms of Companies Act 2015.

28. A less attention has been paid to the pivotal words “due and payable.” First there should be a debt and next it should be due and finally it should be payable. If there is no debt, it is obvious there is no need to pay it. So the existence of debt is pivotal in winding up.
29. It is important that all the three requirements such as existence of debt, that it was due and it was payable, should be present, at the time of statutory demand was issued, if not there is no *locus* for the Petitioner to institute winding up action.
30. Service of statutory demand in terms of Section 515(a) of Companies Act 2015 is void, if the conditions contained in the said provision is not fulfilled. The mandatory condition, is that the ‘Company is indebted in a sum exceeding \$10,000.’
31. This is not the same as Petitioner’s belief, of a debt, whether it was genuine or otherwise. The existence of debt above \$10,000 at the time of service of the demand notice in terms of Section 515 of Companies Act 2015 is the *locus* for Plaintiff to proceed to winding up if the Company.
32. As much as false dispute of admitted debt is an abuse of process, accusation of non-existent debt for threat of winding up should be considered as abuse of process. A threat of winding up is a serious concern of a company and it should not be used unless there was a debt above the threshold, in terms of Companies Act 2015 to instate winding up, and it was due and payable at the time of service of the demand notice.
33. Section 515 creates a legal fiction and according to that, a company is deemed unable to pay its debts if a creditor serves a notice of debt exceeding \$10,000 in terms of said provision and the company was unable to settle the debt, to the reasonable satisfaction of such creditor.
34. It is a misconception that any party can serve a company for an assumed debt of over \$10,000 and failure to honour such demand, can lead to winding up of the company.
35. The Petitioner cannot avail the legal fiction as to the ‘insolvency’ of the Company unless there existed a debt, exceeding \$10,000 and it was due and payable on or before statutory demand was made.

36. If there was no such debt Petitioner cannot issue a statutory demand to the Company. The Petitioner obtains the right to seek winding up only if there was a debt that was due and payable and it was over \$10,000. If not all the proceedings relating to application for winding up, taken by the Petitioner becomes a nullity as there was no *locus* to issue a demand in terms of Section 515(a) of Companies Act 2015.
37. The existence of debt above \$10,000 and the failure to honour it to the satisfaction of creditor, is the crux of the deemed 'insolvency' of the Company. If the debt was below \$10,000 or sum exceeding \$10,000 was not due and payable to the Petitioner, at the time it was demanded, Petitioner could not seek winding up.
38. It is axiomatic, that the fact that statutory demand was over \$10,000 does not make any presumption as to the insolvency of the Company, in terms of Companies Act 2015. It is imperative that the debt exceeding \$10,000 was due and payable, in order to seek presumption of insolvency, to seek winding up.
39. If an act becomes nullity *in limine*, it cannot gain validity, later.
40. In this application for winding up of the Company, there was no debt over \$10,000 due and payable from the Company. Petitioner had allowed rent waiver and had not withdrawn such waiver any time before vacation of premises by the Company. The issuance of invoice at the time of vacation, estopped them from taking a different position on the evidence available at this hearing, upon perusal of documents.
41. Even if there was a debt and that debt was less than \$10,000, no statutory demand seeking winding up can be issued. It is an abuse of process to do so, when the alleged debt was below threshold value on the face of it.
42. The statutory demand was issued for \$10,472.14 and this alleged debt had arisen from Lease Agreement which had a deposit of \$2,000 and deductible of outstanding payments due at the time of termination of the agreement in terms of Clause 16 of Lease Agreement.
43. There is email correspondence that accepted the deposit but at the same time the Petitioner was seeking a set off to another transaction, without sufficient details as to terms of the said transaction which was not relating to lease agreement between parties relating to premises 27 and 28. I was not pointed out any clause in the said agreement that allowed the security to be set off for any payment outside said lease agreement. It is contrary to clause 16 of Lease Agreement.

44. Petitioner in the demand notice had given details of the alleged debt and that referred only to premises 27 and 28.
45. In any event, the correspondence of the Petitioner shows that alleged debt had serious disputes between parties due to their own waiver of rents and correspondence till the Company vacated both premises.

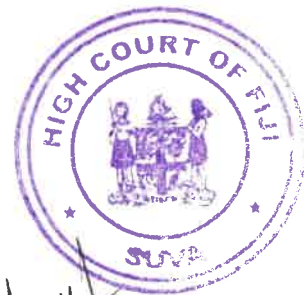
### **CONCLUSION**

46. In terms of Section 523(1) (a) of Companies Act 2015, the court is empowered to dismiss an application for winding up. Accordingly I dismiss this Petitioner's application seeking winding up of the Company, as there was no debt exceeding \$10,000 from the material presented to me at this hearing. It is an abuse of court process, to issue statutory demand seeking winding up, without a debt of over \$10,000. Considering the circumstances of the case cost of this action is summarily assessed at \$3,500 to be paid by Petitioner to the Company within 30 days.

### **FINAL ORDERS**

- a. Application for winding up is struck off.
- b. Cost of this application is summarily assessed at \$3,500 to be paid within 30 days.

**Dated at Suva this 12<sup>th</sup> day of October, 2021.**



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**Justice Deepthi Amaratunga**  
**High Court, Suva**